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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 KISONA MAILOTO, JR.,

11 Defendant.

NO: 2:17-CR-0148-TOR

ORDER DENYING MOTIONS TO
SUPPRESS, DISMISS AND RULINGS
AT PRETRIAL CONFERENCE

12 BEFORE THE COURT are Defendant's Motion to Suppress Statements
13 Obtained in Violation of *Miranda* (ECF No. 41), Motion to Suppress Statements
14 Obtained in Violation of *Massiah* (ECF No. 62), Motion to Dismiss Count 3 based
15 on the Second Amendment (ECF No. 63), and Motions in Limine (ECF Nos. 42,
16 64). A pretrial conference and evidentiary hearing was held on May 2, 2018.
17 Defendant was present and represented by David Fletcher, J. Stephen Roberts, Jr.,
18 and Amy H. Rubin, all from the Federal Defenders of Eastern Washington and
19 Idaho. AUSA Patrick J. Cashman appeared on behalf of the Government. The
20 Court reviewed the motions, responses, all supplemental briefing and the file

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1 therein, considered the testimony of the witnesses and exhibits, heard from
2 counsel, and is fully informed. This order supplements and memorializes the
3 Court's oral rulings at the hearing.

4 **DISCUSSION**

5 1. Motion to Suppress Statements Re: *Miranda* (ECF No. 41).

6 Defendant claims the statements he made to Officer Boling were the result
7 of custodial interrogation in violation of *Miranda*. The Court finds the statements
8 Defendant made to Officer Boling were during a consensual encounter not
9 requiring *Miranda* warnings.

10 Task Force Officer Lee Boling was the only witness who testified. Officer
11 Boling's testimony is fully accepted, this Court finds he was fully credible and
12 detailed in his testimony. The Court finds that Officer Boling contacted
13 Defendant's defense attorney on state charges and notified him that he was
14 conducting a federal investigation for federal violations. Defendant's attorney
15 contacted the Defendant, explained that there was a federal investigation and
16 authorized Officer Boling to meet with Defendant. Defendant's attorney expressly
17 denied representing Defendant on the federal investigation.

18 Defendant voluntarily agreed to meet Officer Boling in a Safeway grocery
19 store parking lot to sign certain paperwork, verify his signature, be advised of his
20 appeal rights, and be advised of his future restrictions regarding firearms. Officer

1 Boling met with Defendant in a public place, without a show of force, without
2 verbal commands. Washington State Patrol Trooper Pichette was present only to
3 witness Defendant's signature. While Trooper Pichette was in full uniform and a
4 marked car, Officer Boling was in plain clothes and a rental pick-up truck without
5 markings or any display of force or authority. Only because it started to downpour
6 rain, Officer Boling invited Defendant to sit in the passenger seat of his pick-up to
7 conclude the interview. At no time did Defendant seek to leave, request the
8 cessation of questioning, or ask for an attorney. Trooper Pichette went to his own
9 car during this time and any show of force because of his uniform was thereby
10 cancelled, as he was no longer present for the conversation that continued.

11 Objectively viewing the encounter demonstrates to this Court that Defendant
12 freely attended the meeting in a public place, was free to leave at any time, his
13 movement was not restrained whatsoever, he was not in custody, and he freely left
14 the meeting after about 40 minutes. The Court emphasizes that only Officer
15 Boling testified and the Court finds him fully credible, so the evidence before the
16 Court is uncontradicted. After examining the totality of circumstances, the Court
17 concludes well beyond a preponderance of the evidence that Defendant was not in
18 custody and thus, no *Miranda* warnings were required. *See United States v.*
19 *Cazares*, 788 F.3d 956, 980-81 (9th Cir. 2015) (test and factors to consider).

1 2. Motion to Suppress Statements Re: *Massiah* (ECF No. 62).

2 Defendant claims the statements he made to Officer Boling were obtained in
3 violation of his right to have his counsel present according to *Massiah v. United*
4 *States*, 377 U.S. 201, 206 (1964).

5 Defendant's Sixth Amendment right to counsel is offense-specific. *See*
6 *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). That is, he had a right to counsel
7 only on the offenses for which he had been charged, and on any other offenses that
8 constituted the "same offense" under the *Blockburger* test. *See Texas v. Cobb*, 532
9 U.S. 162, 167–73 (2001); *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

10 Defendant's attorney on the state charges affirmatively represented that he did not
11 represent Defendant on the federal investigation. The federal charges do not
12 constitute the same offense under *Blockburger*. Therefore, there has been no Sixth
13 Amendment *Massiah* violation. *See United States v. Danielson*, 325 F.3d 1054,
14 1066 (9th Cir. 2003).

15 3. Motion to Dismiss Count 3 based on the Second Amendment (ECF No. 63).

16 Defendant seeks to dismiss count 3 of the Superseding Indictment charging a
17 violation of 18 U.S.C. § 922(g)(8). 18 U.S.C. § 922(g)(8) prohibits any person
18 who is subject to a court order restraining them from "harassing, stalking, or
19 threatening an intimate partner..." from possessing a firearm while the order is in
20 place.

1 [W]hile the Second Amendment protects an individual right to keep and bear
2 arms, the scope of that right is not unlimited. *United States v. Chovan*, 735 F.3d
3 1127, 1136 (9th Cir. 2013) (citing *District of Columbia v. Heller*, 554 U.S. 570,
4 626-27 (2008)). The Ninth Circuit joined the Third, Fourth, Seventh, Tenth, and
5 D.C. Circuits in holding that [a] two-step framework . . . applies to Second
6 Amendment challenges to various firearms restrictions post-Heller. *Chovan*, 735
7 F.3d at 1137. Under this test, “[t]he first question is “whether the challenged law
8 imposes a burden on conduct falling within the scope of the Second Amendment’s
9 guarantee. . . . If the challenged regulation burdens conduct that was within the
10 scope of the Second Amendment as historically understood, then we move to the
11 second step of applying an appropriate form of means-end scrutiny.” *Chovan*, 735
12 F.3d at 1134 (internal quotes omitted, citing *United States v. Chester*, 628 F3d 673,
13 680 (4th Cir. 2010)).

14 Applying that inquiry, the Court holds that § 922(g)(8) burdens conduct
15 falling within the scope of the Second Amendment’s guarantee and that
16 intermediate scrutiny applies to Defendant’s Second Amendment challenge.
17 Applying the Ninth Circuit’s intermediate scrutiny to § 922(g)(8), this Court holds
18 that it is constitutional on its face and as applied to Defendant under the
19 circumstances of his case. The restriction placed on Defendant’s ability to possess
20 a firearm does not implicate the core of the Second Amendment because the

1 restriction is based on a finding by a court of law that Defendant “represent[ed] a
2 credible threat to the physical safety of [his] intimate partner.” RCW
3 9.41.800(3)(c). Moreover, the burden imposed by § 922(g)(8) is lessened by the
4 fact that it is temporary, that is the restriction lasts only so long as the protection
5 order is in place. Thus, this Court holds that § 922(g)(8) is constitutional as
6 applied to Defendant’s circumstances.

7 4. Motions in Limine (ECF Nos. 42, 64).

8 The Court’s rulings are preliminary, dependent on how evidence is offered
9 at trial. As the Supreme Court has noted, *in limine* rulings are

10 “subject to change when the case unfolds. . . . Indeed even if nothing
11 unexpected happens at trial, the district judge is free, in the exercise of
sound judicial discretion, to alter a previous *in limine* ruling.”

12 *Luce v. United States*, 469 U.S. 38, 41–42 (1984). For the reasons stated on the
13 record, the motions are granted and denied as indicated.

14 A. Defendant seeks to exclude evidence regarding the circumstances of his
15 arrest for 4th degree assault and violation of a no-contact order. Defendant is
16 charged with two counts of false statement during purchase of a firearm in
17 violation of 18 U.S.C. § 924(a)(1)(A) and one count of possession of a firearm by a
18 prohibited person in violation of 18 U.S.C. § 922(g)(8). ECF No. 46. While the
19 fact of the no-contact order is relevant to the charges, the underlying conduct has
20 no relevance to the federal charges, whatsoever. Indeed, it would be highly

1 prejudicial to delve into the allegations of the complaining witness or the
2 Defendant's version of the events. This federal trial is not about what happened to
3 prompt the no-contact order, only the consequences arising from its
4 implementation. Therefore, this evidence is excluded.

5 However, notice to Defendant as to the existence and scope of the no-contact
6 order is relevant, including if it was recited to him again, subsequent to an alleged
7 violation.

8 **B.** Defendant seeks to exclude evidence that he allegedly shot firearms at an
9 indoor shooting range. Such evidence is not relevant to the charges before the
10 Court and thus, this evidence is inadmissible.

11 **C.** Defendant seeks to exclude any non-noticed Rule 404(b) and Rule 609
12 evidence. The Government seeks to introduce admissions Defendant made (after a
13 violation of the no-contact order) that he knew he was subject to the no-contact
14 order. Those admissions are admissible. Allegedly shooting a firearm at an indoor
15 range is not admissible. There has been no Rule 609 evidence disclosed, so it is
16 excluded.

17 **D.** Defendant seeks to invoke the exclusion of witnesses during trial
18 according to Federal Rule of Evidence 615. The Court grants Defendant's motion.

19 **E.** Defendant seeks to exclude any Government vouching (expressions of
20 overwhelming evidence; using "we know" verbiage; contrasting Defendant's

1 innocence with prosecution's witness must be lying; and urging conviction to
2 protect community). The Court grants Defendant's motion.

3 **F.** Defendant seeks to exclude any reference denigrating the defense. The
4 Court grants Defendant's motion.

5 **G.** Defendant seeks to preclude pleas to convict as a duty of the jury. The
6 Court grants Defendant's motion.

7 **H.** Defendant seeks *Henthorn* materials. In accord with LCrR 16(a)(7),
8 *Henthorn* materials must be provided.

9 **I.** Defendant seeks preclusion of any undisclosed discovery material. In
10 accord with LCrR 16, discovery shall be provided. The Court notes that purely
11 rebuttal material may not be known by the prosecution until trial, but it must be
12 disclosed as soon as it is discovered. LCrR 16(c).

13 **J.** Defendant seeks to preclude undisclosed expert testimony. The Court
14 grants Defendant's motion precluding undisclosed expert testimony.

15 **K.** Defendant seeks to prohibit the Government from referencing S.F as a
16 "victim." The Government agrees to this restriction and it is so ordered.

17 **L.** Defendant seeks to exclude evidence of the characteristics of other
18 weapons not involved or charged in the federal indictment. The Court grants
19 Defendant's motion. If for some reason reference need be made that Defendant
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1 transferred other firearms as a result of the no-contact order, that reference should
2 merely recite “firearms” not any more specific and prejudicial description.

3 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 4 1. Defendant’s Motion to Suppress Statements Obtained in Violation of
5 *Miranda* (ECF No. 41) is **DENIED**.
- 6 2. Defendant’s Motion to Suppress Statements Obtained in Violation of
7 *Massiah* (ECF No. 62) is **DENIED**.
- 8 3. Defendant’s Motion to Dismiss Count 3 based on the Second Amendment
9 (ECF No. 63) is **DENIED**.
- 10 4. Defendant’s Motions in Limine (ECF Nos. 42, 64) are **GRANTED** in part
11 and **DENIED** in part.

12 The District Court Executive is directed to enter this order and provide
13 copies to counsel.

14 **DATED** May 4, 2018



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
Chief United States District Judge